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SUPREME COURT, U.S.

No. 08-130

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner.

v.

ADA COUNTY, IDAHO; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF

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QUESTION PRESENTED

The Ninth Circuit below affirmed the decision of the District Court, invalidating application of a National Rule for which this Court has paramount need and exceptional importance for securing and maintaining national uniformity in decisions. The Panel's decision has created a notable conflict with other existing opinions entered by the U.S. Supreme Court, the Ninth Circuit, and other U.S. Courts of Appeals with respect to when claim preclusion (*res judicata*) and issue preclusion (*collateral estoppel*) are an "absolute bar" to a constitutional violation actionable under 42 U.S.C. § 1983. The question presented is:

Whether the procedural due process protection analysis announced under *Zinermon v. Burch*, 494 U.S. 113 (1990), precludes the use of the doctrines of *collateral estoppel* and *res judicata* as an absolute bar to a federal claim, when State courts fail to provide any adequate procedural due process remedy, particularly when the federal claim was embraced in a county ordinance (authorized by State law), intending to give a classified employee procedural due process remedies, but instead, was held "constitutionally infirm" by the Idaho Supreme Court, which has stripped Petitioner of her protected employment property rights guaranteed under the Fourteenth Amendment of the U.S. Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following caption contains the names of all the parties to this proceeding:

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, IDAHO, a political subdivision of the State of Idaho; ADA COUNTY BOARD OF COMMISSIONERS, acting in its official capacity; ADA COUNTY SHERIFF'S OFFICE, acting in its official capacity; AND JOHN AND JANE DOES I through X, inclusive, individually and in their capacities as officials, employees and/or agents of ADA COUNTY, IDAHO, and acting under color of State Law,

Respondents.

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INTRODUCTION

In the Complaint filed in the Federal District Court on July 5, 2005, Petitioner specifically identified her cause of action, to be as follows:

> "Defendants have deprived Plaintiff of her Constitutional and Statutory rights, under color of law, by denying Plaintiff the right to pursue procedural due process and to have right to access agency administrative review and judicial review of her employment property rights."

That particular cause of action was selected to demonstrate that Ada County (state actors), under color of law, deprived Ms. Gibson of a right guaranteed by the U.S. Constitution, as a matter of federal law. Since July 20, 1999, Ada County has committed a cascade of malicious acts, none of which has been rectified by any Idaho court, and that failure to provide a forum to address constitutional guarantees has set forth the stage for this Title 42 claim in federal district court, concerning their acts and conduct as follows:

> **(1)** Denial of procedural due process when unilaterally placed on administrative leave, without pay, by the Sheriff's Office, with no notice or hearing, deemed by federal law *de facto* termination when not providing procedural due process. *See Gilbert v. Homar*,

520 U.S. 924, at 930 (1997); *Homar v. Gilbert*, 89 F.3d 1009, 1015 (3rd Cir. 1996);

(2) Denial of procedural due process by refusing a pre-termination hearing, a prerequisite under federal law. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985);

(3) Denial of procedural due process by denying an opportunity to engage an unbiased post-termination hearing with an unbiased tribunal, as required by federal law;

(4) Denial of procedural due process by denying an administrative agency review to challenge the basis claimed to terminate Appellant's employment;

(5) Denial of procedural due process by failing to provide any forum for judicial review of the basis to terminate employment, either by Petition For Judicial Review to a lower court, appellate review to the Idaho Supreme Court, or Petition For Declaratory Judgment, Petition For Writ Of Mandamus, or Petition For Writ Of Certiorari to the Idaho Supreme Court;

(6) Denial of procedural due process by failing to provide adequate judicial review forum with an Idaho court under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 201 *et seq.*, to enforce the "right of action" to

recover overtime and regular wages due Appellant, and seek redress for the retaliatory conduct when depriving Appellant federal statutory "right of action" under FLSA; and,

(7) Denial of procedural due process by failing to provide adequate judicial review forum with an Idaho court under the *Civil Rights Act*, 42 U.S.C. § 1983, causing need to seek federal assistance.

The State of Idaho and its political subdivision, Ada County (state actors), denied Ms. Gibson any venue to review the taking of a property right, a procedural protection afforded by a constitutional due process right, and our Idaho courts have admittedly recognized they cannot provide any review or any venue to review the merits of Ms. Gibson's terminated employment, as the mechanism contemplated for that objective has been rendered to be "constitutionally infirm", and the Idaho Supreme Court has so forthrightly stated there is no available forum for review, and is not empowered to mandate such a right to review. Despite our attempts at (1) filing Petition for Judicial Review to a state court, (2) seeking appellate review to the Idaho Supreme Court, (3) filing Petition for Declaratory Judgment, (4) filing Petition for Writ Of Mandamus, and filing (5) Petition for Writ Of Certiorari to the Idaho Supreme Court, no form of any due process has been extended to Petitioner, and Petitioner's ability to exercise her right to procedural due process has been side-stepped and denied, as the Idaho Court has stated there is no available forum to get there, and

the Idaho Court will not mandate an agency (or lower court) to undertake that due process right, as the perceived mechanism structured in the County Ordinance for such purpose was flawed and void.

ARGUMENT ON NEW AUTHORITY

In order for Petitioner to state a claim for the failure of Ada County to provide a procedural due process remedy, she must have taken advantage of those processes that were available to her, unless those procedures were unavailable or patently inadequate. As the Court will note, Petitioner sought every avenue to obtain the procedural remedy, and got nowhere in Idaho. If Petitioner had simply refused to avail herself of those procedural mechanisms available to her, the County cannot be held to have violated due process requirements if it made procedural due process protection available. *See Akuma v. State*, Civil No. 07-1058 (JBS), page 5, U.S. District Court, D. New Jersey, **September 17, 2008**, therein citing *Dusanek v. Hannon*, 677 F.2d 538, 543 (7th Cir. 1982).

Petitioner was required to take advantage of the processes that were available to her in order to preserve and maintain her claim alleging the failure of Respondents to provide procedural due process. As this Court held in *Zinermon v. Burch*, 494 U.S. 113, 126 (1990), "A due process violation is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." "If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a

means to get back what he wants." *See Akuma v. State*, Civil No. 07-1058 (JBS), page 5-6, U.S. District Court, D. New Jersey, **September 17, 2008**, therein citing also *McDaniels v. Flick*, 59 F.3d 446, 460 (3d Cir. 1995); *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000); *Zinermon v. Burch*, 494 U.S. 113, 126 (1990).

On February 9, 2006, the Idaho Supreme Court held in *Gibson v. Ada County*, 142 Idaho 746, 133 P.3d 1211 (**2006**) (Rehearing denied May 9, 2006), (page 757) that:

> "**This Court affirms** the district court's **decision to deny Gibson's Petition for Judicial Review** and adopt its findings that: "Pursuant to Rule 84, I.R.C.P., a petition for judicial review will only lie if permitted by statute. **There exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decision of other elected County officers.**" Emphasis added.

CONCLUSION

Clearly, the Idaho Court has been given numerous times the opportunity (5 opportunities) to remedy the procedural failings of its subdivisions and agencies, by mandating the appropriate forum, be it the agency, their review board, or the State court itself, and having failed to remedy the procedural failings, these Respondents are now subject to a claim for this

procedural due process violation that **only** a Federal Court can remedy in this claim now before it, as again confirmed by the most recent holding of the concept in the Federal District Court of New Jersey. There could be no dispute the Idaho State court has provided no remedy to this procedurally flawed deprivation of a due process protected interest. The preclusion defenses do not apply, and the petition for writ of certiorari must be granted.

Respectfully Submitted,

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